IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 13, 2009 Session

STATE OF TENNESSEE v. ROLAND PATRICK COBBINS

Appeal from the Circuit Court for Coffee County
No. 35,475F Charles Lee, Judge

No. M2008-02017-CCA-R3-PC - Filed July 31, 2009

The Defendant, Roland Patrick Cobbins, was charged with and convicted by a jury of: two counts of burglary of a vehicle, both Class E felonies; two counts of theft under $500, one count of possession of burglary tools, and one count of vandalism under $500, all Class A misdemeanors; and one count of theft over $1,000, a Class D felony. See Tenn. Code Ann. §§ 39-14-402, -105, -701, 408. He was sentenced as a Range II, multiple offender to six years for his Class D felony, three years for each Class E felony, and eleven months and twenty-nine days for each misdemeanor. The trial court ordered that all misdemeanor sentences run concurrently with each other and with the Defendant's felony sentences. It also ordered that both Class E felony sentences run consecutively to one another and concurrently with all other sentences, and that the Defendant's Class D felony conviction run concurrently with all other sentences. The Defendant therefore received a total effective sentence of six years in the Department of Correction. In this direct appeal, the Defendant contends that: (1) the evidence was insufficient to convict him; (2) the State violated discovery rules in failing to provide him with exculpatory evidence; and (3) the trial court erred in setting the length of his sentence. After our review, we affirm the Defendant's convictions but remand for reconsideration of his sentencing range.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Reversed in Part; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Norris A. Kessler, III, Winchester, Tennessee, for the appellant, Roland Patrick Cobbins.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Mickey Layne, District Attorney General; and Felicia B. Walkup, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In presenting proof on the charge of theft over $1,000, the State first called Ernest York, a resident of Pawley's Island, South Carolina. He testified that on July 14, 2006, he was made aware that a Toshiba video projector he used in his business had been stolen along with its accessories, remote controls, and wires. He reported the items as stolen to the Anderson County, South Carolina Sheriff's Department and to his insurance company. He had paid about $1,500 for the projector less than sixty days beforehand. Three to four months later, he was sent a photo of the recovered projector, which he identified as his based on its serial number. He also identified, at trial, a bag used to carry the projector, the projector itself, a compact disc that came with the projector, and three user booklets, one of which had some of Mr. York's handwriting on it. Mr. York did not know the Defendant.

The remaining events underlying this case took place on July 16, 2006. Sarah Dixon testified that on that day, she worked from about 2:00 or 3:00 p.m. to about 8:30 or 9:00 p.m. at a Manchester, Tennessee Cracker Barrel Restaurant. Upon arriving at work that day, she parked on the side of the parking lot with her red Ford Mustang facing the restaurant. She placed her multi-colored, polka-dotted purse under her front passenger seat. She locked the car and stayed inside Cracker Barrel for the duration of her shift. Upon returning to her car after the shift, she noticed broken glass on her passenger seat. Her purse was gone, and the small triangular window behind her main passenger-side window was broken. Ms. Dixon said that the purse and its contents were worth about $160 and that the broken window cost $279.68 to replace. She called the police and watched surveillance video of her car but was unable to see the person who had broken into her car. The officer assisting her eventually received a call detailing another theft at a nearby Shoney's Restaurant, where her purse was retrieved from a dumpster and eventually returned to her.

Rebecca Wilson worked at that nearby Shoney's Restaurant on July 16, 2006. Her shift ended at about 7:00 or 8:00 p.m., at which time she waited with Anita Palomarez in Anita's car.[1] The two planned to wait for the end of Juanita Palomarez's shift so that all three could drive home. After about ten or fifteen minutes of waiting, Ms. Wilson testified that what she believed to be a post-2000 silver Lexus sedan drove up next to the Shoney's dumpster as she and Anita waited. Anita testified that the Lexus was either silver or gold but could not remember which. A black male in black jeans and a dark shirt exited the vehicle and began throwing things into the dumpster. He then drove his car away from the dumpster and stopped next to a van belonging to another Shoney's employee, Nakita Martin. Anita and Ms. Wilson then lost sight of the man as he walked to the opposite side of Ms. Martin's van. They then saw a beam of light shining into the van. Ms. Wilson called Ms. Martin on her cell phone and asked if anyone was supposed to come by and put anything in the van. Ms. Martin responded in the negative.

[1] Anita and Juanita Palomarez are sisters; because they share a last name, we will refer to them as "Anita" and "Juanita" hereafter to avoid confusion.

Anita and Ms. Wilson then heard the sound of shattering glass. Ms. Wilson told Ms. Martin that someone had broken into her van. As the man returned to his Lexus and began to drive toward the parking lot exit, Anita, Ms. Wilson, and Ms. Martin gathered near the van and observed that the sliding door's window had been broken. Ms. Martin confirmed that her purse was gone.

The group briefly went into Shoney's, asking manager Melissa Vanmeter to call the police. During this time, the Lexus was driving around the building toward the exit and was still in sight. Ms. Martin testified that the Lexus was a "silver champagne color." Anita, Ms. Wilson, and Ms. Martin returned to Anita's car and drove after the Lexus. They lost sight of it at a nearby stoplight but continued to drive around the area. Each of the three testified that the same Lexus turned directly in front of them from a side street about five or six minutes later. Ms. Wilson was able to see the Lexus' tag number; on her cell, she relayed it to Ms. Vanmeter, who relayed it to the police. She also wrote the tag number on a piece of paper, which was introduced at trial. Neither Anita, Ms. Wilson, nor Ms. Martin was able to identify the driver of the Lexus.

As the Lexus began to pull into a Captain D's Restaurant parking lot, Ms. Vanmeter told Ms. Wilson that a policeman was in their area and that they should return to Shoney's. They did so. There they met Officer Jason Walker of the Manchester Police Department, who had received the burglary call a few minutes earlier. Ms. Martin described her purse and the items therein to Officer Walker, noting that she had about fifty dollars inside, composed mostly of one-dollar bills she had received as tips, as well as a few five and ten-dollar bills. Officer Walker had already received a description of the Lexus and received its tag number from Ms. Wilson. He also learned that the Lexus had been seen driving into the Captain D's less than a mile away.

Arriving at the Captain D's, Officer Walker noticed a Lexus backed into a parking space. He exited his vehicle and walked to the back of the car; the tag number matched the one he had received from Ms. Wilson. Officer Walker then noticed the Defendant about seven car lengths away from him; the Defendant ducked down and appeared to throw something into some nearby sage grass. He then ran toward the front door of Captain D's. Officer Walker ran after the Defendant and ordered him to stop; Officer Walker did not remove his weapon from its holster. Before reaching the door, the Defendant dropped to the ground, laid on his stomach, and asked, "what did I do?"

Officer Walker detained the Defendant in the back of his police car, reading him his rights per Miranda v. Arizona, 384 U.S. 436 (1966). The Defendant chose not to make a statement. Officer Walker also ran the Defendant's driver's license and confirmed that the Lexus' tag number was registered to the Defendant. Officer Walker then searched the area where the Defendant had thrown something; he found a chisel, a flashlight, a pair of gloves, and a sock. Officer Walker collected these items. He then looked into the Defendant's car using his flashlight, and he saw a debit card on the center console marked with the name "Nakita Martin." The Defendant also had one one-hundred dollar bill and eleven one-dollar bills on his person. He had no five, ten, or twenty dollar bills. Upon searching the Lexus' trunk, Officer Walker found what was later determined to be the projector owned by Ernest York.

In the course of the investigation, Officer Walker witnessed Sarah Dixon's purse being recovered from the dumpster at Shoney's. He also saw Ms. Martin's purse being recovered from a dumpster behind a Fred's store at the Whispering Pines Shopping Center about a half-mile away. Officer Walker, having bagged the chisel, flashlight, gloves, and sock, delivered them to Mark Yother, an Investigator with the Manchester Police Department. Investigator Yother testified that, upon receiving those pieces of evidence, he locked them in his personal office storage closet where they remained until he conveyed them to Officer Walker for use at trial.

The Defendant chose to testify in his own defense. He stated that he had driven from North Carolina to Nashville, Tennessee on July 13, 2006, to visit his brother. He stayed at a Quality Inn. He checked out of the Quality Inn on July 16, 2006, between 12:30 and 12:45 p.m. He spent the day with his brother, leaving at about 5:30 p.m. He stopped in Murfreesboro for thirty to thirty-five minutes to play some lottery tickets, then proceeded down Interstate 24. He got off the interstate at exit 114, planning to eat at Captain D's. After exiting, he noticed a police car make two U-turns in order to follow him. The Defendant proceeded to Captain D's, where he parked his car and walked toward the restaurant. As he approached the door, he heard footsteps, turned around, and saw a gun pointed at his face.

The Defendant said he then realized a police officer was confronting him. The officer told the Defendant to get down on the ground. The Defendant did so. The officer then handcuffed the Defendant, leaned him over the trunk of his police car, and emptied the Defendant's pockets. Without saying anything, the officer placed the Defendant in the back of the police car for fifteen to twenty minutes. During that time, the officer searched the Defendant's car, opening the trunk and every door. Eventually a wrecker arrived and towed the Defendant's car. The officer then transported the Defendant to jail, where he waited for four hours before anyone read him his rights or informed him of the charges against him.

The Defendant noted that he owned a gold 1995 Lexus with tinted windows. He testified that he never went to Cracker Barrel or Shoney's. He explained that he bought Ernest York's video projector at a yard sale for seventy-five dollars immediately after leaving Nashville. The Defendant also noted that he was financially sound at the time and had no reason to steal. The Defendant had no knowledge of any chisel, flashlight, gloves, sock, or bank card.

At the conclusion of the proof, the jury found the Defendant guilty as charged. Following a sentencing hearing, the trial court sentenced the Defendant to an effective sentence of six years to be served in the Department of Correction. The Defendant now appeals from the judgments entered by the trial court.

Analysis

I. Sufficiency of the Evidence

The Defendant first challenges the sufficiency of the evidence used to convict him. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the

findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

The Defendant was convicted of two counts of burglary of a vehicle, two counts of theft under $500, one count of possession of burglary tools, one count of vandalism under $500, and one count of theft over $1,000. "A person commits burglary who, without the effective consent of the property owner . . . [e]nters any . . . motor vehicle with intent to commit a felony, theft, or assault . . . ." Tenn. Code Ann. § 39-14-402(a)(4). A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent. Tenn. Code Ann. § 39-14-103. "A person who possesses any tool, machine or implement with intent to use the same, or allow the same to be used, to commit any burglary," commits a crime. Tenn. Code Ann. § 39-14-701. Finally, "[a]ny person who knowingly causes damage to or the destruction of any real or personal property of another . . . knowing that the person does not have the owner's effective consent is guilty of" vandalism. Tenn. Code Ann. § 39-14-408.

There is no dispute in this case that the charged burglaries, thefts, and vandalism occurred; the issue is only the sufficiency of the proof of the Defendant's identity as the perpetrator. Evidence of the Defendant's identity is circumstantial because no witness could identify him as the perpetrator of any crime. As such, we note that

> the law is firmly established in this State that to warrant a criminal conviction upon circumstantial evidence alone, the evidence must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude

> every other reasonable theory or hypothesis except that of guilt, and it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that he is the one who committed the crime.

Pruitt v. State, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970). "The inferences to be drawn from [circumstantial] evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." Id. at 391 (quoting Marable v. State, 313 S.W.2d 451, 452 (Tenn. 1958)).

Sarah Dixon testified that her car window was broken and her purse taken. Her purse was later recovered from a dumpster behind a nearby Shoney's, at which Anita Palomarez and Rebecca Wilson witnessed a man, driving a car identified as the Defendant's, dispose of some items. Anita and Ms. Wilson then witnessed the same man break the window of Nakita Martin's van. Ms. Martin testified that her purse was taken. Although Anita, Ms. Martin, and Ms. Wilson lost sight of the perpetrator's vehicle, each testified that they rediscovered the same vehicle five to six minutes later. At this time, they acquired the vehicle's tag number, tying it to the Defendant. Officer Jason Walker then discovered the Defendant within seven car lengths of his vehicle, and witnessed him disposing of what Officer Walker later discovered to be burglary tools. Finally, Officer Walker recovered Ms. Martin's debit card from the Defendant's vehicle. We conclude that, given this evidence, a reasonable jury could have found the Defendant guilty of the burglary of Ms. Dixon's car, the theft of her purse, the burglary of Ms. Martin's car, the theft of her purse, and possession of the burglary tools recovered by Officer Walker.

As to Ernest York's video projector, unsatisfactorily explained possession of very recently stolen property allows the trier of fact to infer that a defendant committed theft. See State v. Hatchett, 560 S.W.2d 627, 629 (Tenn. 1987). In our view, any rational jury could have found unsatisfactory the Defendant's claim that Mr. York's nearly new video projector, stolen on July 14, 2006, in South Carolina, was sold for a fraction of its original value two days later at a Nashville yard sale.

Based on our review of the evidence presented at trial, we therefore conclude that any rational jury could have found the Defendant guilty of each charge beyond a reasonable doubt.

II. Admission of Evidentiary Photographs

The Defendant next contends that the trial court erred in admitting photographs of Nakita Martin's bank card, as well as her and Sarah Dixon's purses and various other items, because those items themselves were not introduced at trial. Because the Defendant did not contemporaneously object to the introduction of the photographs, however, this issue is waived. See Tenn. R. App. P. 36(a). In a related issue, the Defendant contends that the State deprived him of a fair trial by failing to turn those items over to him due to what he views as their exculpatory value.

The Defendant's contention regarding admission of the photographs lacks merit unless he can establish plain error. Tennessee Rule of Criminal Procedure 52(b) states that "[a]n error which

has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." Plain error requires a defendant to establish five factors: (1) "the record must clearly establish what happened in the trial court"; (2) "a clear and unequivocal rule of law must have been breached"; (3) "a substantial right of the accused must have been adversely affected"; (4) "the accused did not waive the issue for tactical reasons"; and (5) "consideration of the error is necessary to do substantial justice." State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (adopting the factors outlined in State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). "All five factors must be established by the record before" an appellate court may "recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." Smith, 24 S.W.3d at 283.

As with other evidence, photographs are admissible so long as they are relevant and their probative value is not substantially outweighed by the danger of unfair prejudice. See Tenn. R. Evid. 402, 403. The photographs in this case meet both criteria, and the trial court therefore breached no clear and unequivocal rule of law in admitting them.

The State has a duty to preserve all evidence subject to discovery under Tennessee Rule of Criminal Procedure 16. Our inquiry when presented with an argument that the State failed to preserve evidence is "whether a trial, conducted without the destroyed evidence, would be fundamentally fair." State v. Ferguson, 2 S.W.3d 912, 914 (Tenn. 1999). This issue of fundamental fairness first asks whether the State had a duty to preserve the evidence at issue. Id. at 917.

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. (quoting California v. Trombetta, 467 U.S. 479, 488-89 (1984)).

The Defendant argues that he would have been able to confirm the absence of his fingerprints on Ms. Dixon's and Ms. Martin's stolen items had they been provided to him. This, he claims, would have demonstrated that "these items were never in [his] possession." Even assuming that this evidence was indeed exculpatory, we conclude the Defendant is not entitled to relief. This determination requires consideration of

> several factors which should guide the decision regarding the consequences of the breach. Those factors include: (1) the degree of negligence involved; (2) the significance of the destroyed evidence, considered in light of the probative value and

reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to support the conviction.

Id.

In our view, the evidence which was not preserved had little probative value. Officer Walker saw Ms. Martin's debit card in the Defendant's car. Anita and Ms. Wilson testified that a man driving the Defendant's car threw items into the dumpster in which Ms. Dixon's purse was found. Finally, Officer Walker saw the Defendant attempt to dispose of a number of items, including a pair of gloves. The presence of these gloves would have lessened the probative value of any evidence that the Defendant's fingerprints did not appear on the stolen items. We therefore conclude that the trial court did not breach a clear and unequivocal rule of law by allowing the trial to continue without the photographed evidence. This issue is without merit.

III. Sentencing

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

The Defendant's conduct occurred subsequent to the enactment of the 2005 amendments to the Sentencing Act, which became effective June 7, 2005. The amended statute no longer imposes a presumptive sentence. Carter, 254 S.W.3d at 343. As further explained by our supreme court in Carter,

> the trial court is free to select any sentence within the applicable range so long as the length of the sentence is "consistent with the purposes and principles of [the Sentencing Act]." [Tenn. Code Ann.] § 40-35-210(d). Those purposes and principles include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," [Tenn. Code Ann.] § 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," [Tenn. Code Ann.] § 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," [Tenn. Code Ann.] § 40-35-103(5).

Id. (footnote omitted).

The 2005 Amendment to the Sentencing Act deleted appellate review of the weighing of the enhancement and mitigating factors, as it rendered these factors merely advisory, as opposed to binding, upon the trial court's sentencing decision. Id. Under current sentencing law, the trial court is nonetheless required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the application of enhancing and mitigating factors. Id. at 344. The trial court's weighing of various mitigating and enhancing factors is now left to the trial court's sound discretion. Id. Thus, the 2005 revision to Tennessee Code Annotated section 40-35-210 increases the amount of discretion a trial court exercises when imposing a sentencing term. Id. at 344.

To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See id. at 343; State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001). If our review reflects that the trial court applied inappropriate mitigating and/or enhancement factors or otherwise failed to follow the Sentencing Act, the presumption of correctness fails and our review is de novo. Carter, 254 S.W.3d at 345.

The presentence report in this case reflects that the Defendant was forty-seven years old and married at the time of sentencing. He reported himself to be in fair physical health; he had diabetes and a number of physical disabilities caused by a 1997 motorcycle accident. He reported no drug use, and some limited employment history between 1994 and 2000. Based upon the presentence report, he appears to have been convicted of numerous felonies: a United States District Court conviction for being a felon in possession of a handgun, and several felonies in North Carolina state courts, including grand larceny, possession of contraband in a penal facility, two counts of breaking and entering, attempted forgery, aggravated assault, theft, and two counts of burglary of an automobile. However, all but four of these felony convictions indicate that the Defendant was a juvenile at the time of the convictions. The trial court specifically found that the proof at sentencing did not establish that the Defendant had been tried and convicted of these crimes as an adult rather than a juvenile. Also, the Defendant and the State noted at sentencing that the Defendant's federal conviction for being a felon in possession of a handgun had been vacated on appeal.

A. Determination of Sentencing Range

The trial court sentenced the Defendant as a Range II, multiple offender based on its finding that the Defendant had three previous felony convictions as an adult. Although it is unclear from the record, the trial court apparently relied upon a 1981 conviction for breaking and entering, a 1996 conviction for possession of contraband in a penal facility, and a 1999 conviction for grand larceny. The Defendant received each of these convictions in North Carolina state courts. The Defendant contends that the trial court erred in determining his sentencing range because the State did not introduce certified copies of the convictions upon which the trial court relied. As the State notes, however, this Court has held that "certified copies of convictions are not necessary to prove a prior criminal history; thus, courts can rely upon the presentence report." State v. Adams, 45 S.W.3d 46, 59 (Tenn. Crim. App. 2000) (citing State v. Richardson, 875 S.W.2d 671, 677 (Tenn. Crim. App. 1993)); see also State v. Alton Tappan, No. W2006-00168-CCA-R3-CD, 2007 WL 1556657, at *7 (Tenn. Crim. App., Jackson, May 29, 2007) (holding that the "trial court could have sentenced the defendant as a persistent and career offender based on the presentence investigation report and was not required to impose Range I sentences in the absence of certified copies of the judgments.").

The Defendant also argues that the trial court did not comply with Tennessee Code Annotated section 40-35-106(b)(5)'s requirement that "[i]n the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given." When classifying such an offense, courts must compare its elements to Tennessee law as it existed at the time the offense was committed.

Possession of contraband in a penal facility was a named Class C felony in Tennessee in 1996, the year the Defendant was convicted in North Carolina. See Tenn. Code Ann. § 39-16-201 (1996). The presentence report notes that the Defendant committed grand larceny in North Carolina in 1999. Grand larceny was not a named offense in Tennessee at that time, our grand larceny statute, Tennessee Code Annotated section 39-3-1104, having been repealed as of November 1, 1989.[2] See State v. Phyllis E. Hathaway, No. E2004-00223-CCA-R3-PC, 2005 WL 467159, at *7 (Tenn. Crim. App., Knoxville, Feb. 28, 2005). The trial court did not classify the North Carolina grand larceny conviction using Tennessee law. We also note that the trial court did not attempt to classify the 1981 North Carolina breaking and entering conviction using Tennessee law as it existed in 1981.

Because the trial court did not follow the proper sentencing procedures when finding the Defendant to be a Range II multiple offender, this case must be remanded to the trial court for resentencing. At the resentencing hearing, the trial court shall determine, in accordance with Tennessee Code Annotated section 40-35-106(b)(5), whether the North Carolina convictions qualify the Defendant for sentencing as a Range II, multiple offender.

[2] We also note that North Carolina abolished the distinction between petit larceny and grand larceny effective October 1, 1994. See N.C. Gen. Stat. Ann. § 14-70.

B. Length of Sentence

We will review the length of the Defendant's sentence irrespective of our order that the trial court reconsider his sentencing range. The Defendant's total effective sentence is the same as his longest sentence: six years for theft over $1,000. As a Range II, multiple offender, the Defendant faced a four to eight year sentencing range for this Class D felony. See Tenn. Code Ann. § 40-35-112(b)(4). In sentencing the Defendant to six years, the trial court found as enhancement factors that the Defendant: had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult; and had failed to comply with the conditions of a sentence involving release into the community. See Tenn. Code Ann. § 40-35-114(1), (8), (16). The trial court found as a mitigating factor that the Defendant's criminal conduct neither caused nor threatened serious bodily injury, although it gave that factor little weight. See Tenn. Code Ann. § 40-35-113(1). The trial court also denied alternative sentencing based on its findings that the Defendant was not a presumptive candidate, see Tennessee Code Annotated section 40-35-102(6) (stating that a defendant "should be considered as an alternative sentencing candidate" if determined to be an especially mitigated or standard offender convicted of a Class C, D, or E felony) and that the Defendant has a history of failure to abide by the conditions of release into the community. After our review, we conclude that the trial court properly considered the required sentencing principles and all relevant facts and circumstances. We conclude that the trial court did not err or abuse its discretion in setting the Defendant's sentence at mid-range.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the Defendant's convictions but remand for reconsideration of his sentencing range.

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DAVID H. WELLES, JUDGE